



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 2, 1990

**Mr. Ron Resech
Executive Director
Texas Cosmetology Commission
The Frank Joseph Cosmetology Bldg.
1111 Rio Grande
Austin, Texas 78701**

LO-90-87

Dear Mr. Resech:

Section 19 of the Cosmetology Regulatory Act, article 8451a, V.T.C.S., provides for the issuance of "beauty shop licenses" by the Texas Cosmetology Commission. You ask whether the commission, under the guidelines set out in section 19, may require a beauty shop license for "people who act as independent contractors and rent a booth" in a licensed beauty shop. You advise that many beauty shops "are leasing space in their salon(s) to independent contractors who rent a booth in the licensed establishment."

A person must have a section 19 beauty shop license to "maintain an establishment in which any practice of cosmetology is performed."¹ V.T.C.S. art. 8451a, § 19(a); see also id. § 20 (providing for "specialty shop license" to "maintain an establishment" in which stated specialized acts of cosmetology are performed). Subsection (b) of section 19 provides that a person seeking to obtain a "beauty shop license" must submit an application that contains proof of the particular requisites of a beauty shop as established by the commission. Subsection (c) provides that the application must show "compliance with the rules of the commission." See also id. § 9(b) (a person may not "conduct or operate a beauty shop . . . or any other place of business in which the practice of cosmetology is . . . practiced" without having appropriate license).

1. Section 1(3) of the act defines which acts, services, etc., constitute the practice of cosmetology.

Article 8451a provides, in addition, for the issuance of licenses to persons to perform some or all of the practices of cosmetology. See id. §§ 10 (providing for "operator's license" for any practice of cosmetology); 11, 13 (providing respectively for licenses to perform only manicuring or stated specialized acts of cosmetology); see also id. § 9(a) (a person "may not perform . . . any practice of cosmetology" without having appropriate license).

We think that under the scheme of article 8451a -- which provides for different licenses for persons who "perform" cosmetological practices and for persons who "maintain establishments" in which cosmetological practices are performed -- the issue with regard to whether a person who rents a booth in a licensed shop must have a section 19 "beauty shop license" is whether his activities in connection with the rented booth are tantamount to "maintain[ing] an establishment in which [the] practice of cosmetology is performed" within the meaning of the section. Resolution of this issue will depend, at least in part, on the facts of the particular case. We do not think the fact that such a person, rents a booth in a licensed shop is an "independent contractor" is in itself determinative of the issue.

In American law, the need to determine whether a person is an independent contractor or employee arises principally in connection with the question of the employer's liability for the work-related acts of the person. See 44 Tex. Jur. 3d Independent Contractors § 1. The determination has also become significant in the related areas of workers compensation and unemployment compensation, and in social security and taxation matters as well. Though the factors considered in determining whether an independent contractor relationship exists may vary somewhat depending on the purposes for which the determination needs to be made, the principal criterion is the employer's right to control the details of the worker's performance. Where such right of control exists, the worker is generally considered to be an employee. Where the right to control extends merely to the result to be accomplished but not to the details of the means and methods for accomplishing the result, the worker is generally considered to be an independent contractor. See 44 Tex. Jur. 3d Independent Contractors §§ 2, 6.

Even if a person "renting a booth in a licensed shop" is in fact under any definition of the term, acting as an independent contractor, his activities may not involve "maintaining an establishment" under section 19. Whether he is "maintaining an establishment" under section 19 would, we

think, depend rather on the nature of his arrangements with the shop. Relevant factors would include who has responsibility for "maintaining" the area in which he works and the equipment and materials he uses, how he is remunerated for his work, who makes the appointments for his clients, and whether the shop's clients -- walk-in or otherwise -- are assigned to him. While he may be an independent contractor, in that he is not subject to the control of the shop in the details of his performance of cosmetology, it may be that it is the operators of the shop, and not he, who maintain the establishment, including the booths which it rents out.

Our response to your first question is, therefore, that whether a cosmetologist who rents a booth in a licensed shop as an independent contractor is subject to the requirement of article 8451a, section 19, that he have a beauty shop license, would depend on the facts of the particular case -- i.e., on whether he is in fact "maintain[ing] an establishment in which [the] practice of cosmetology is performed."

Your second question is whether the Cosmetology Commission may "establish different guidelines" for beauty shop licenses for persons renting booths in licensed shops than for beauty shop operators generally.

Section 4 of article 8451a, in subsection (a), empowers the commission to "issue rules consistent with this Act" in accordance with the Administrative Procedure and Texas Register Act, V.T.C.S. article 6252-13a, and subject to repeal by action of the appropriate standing committees of both houses of the legislature. Subsection (d) specifically empowers the commission to issue sanitation rules. Also, as mentioned above, subsection (b) of section 19 contemplates the commission's establishment of "requisites for a beauty shop," and in subsection (c) that a beauty shop license application show "compliance with the rules of the commission."

You do not indicate what kinds of differing guidelines for persons renting booths you envision. To be valid, however, any such rules would have to be reasonable, consistent with the act, and not in excess of your statutory authority. Kelly v. Industrial Accident Bd., 358 S.W.2d 874 (Tex. Civ. App. - Austin 1962, writ ref'd).

We note that you refer in your request to a distinct "booth/lease license." Neither section 19 nor any other provisions of article 8451a authorize the commission to issue a license for maintaining an establishment in which

general cosmetology is practiced other than the section 19
"beauty shop license."

Very truly yours,



William Walker
Assistant Attorney General
Opinion Committee

APPROVED: Rick Gilpin, Chairman
Opinion Committee

Sarah Woelk, Chief
Letter Opinion Section

RG/SW/WW/mc

Ref.: RQ-2089
ID# 1047